

New York New York Hotel, LLC, d/b/a New York New York Hotel and Casino and Culinary Workers Union, Local 226, affiliated with Hotel Employees and Restaurant Employees International Union, AFL-CIO. Case 28-CA-15148

July 25, 2001

DECISION AND ORDER

**BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN
AND TRUESDALE**

On April 9, 1999, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party Union filed answering briefs, and the Respondent filed reply briefs to each of the answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings, and conclusions as modified and to adopt the recommended Order.

The Respondent owns and operates a hotel and casino facility in Las Vegas, Nevada. The Union represents a bargaining unit of certain of the Respondent's employees. Ark Las Vegas Restaurant Corporation (Ark) operates several restaurants and eateries within the casino. At the time of the events in this case, the Union was attempting to organize Ark's employees and to obtain recognition from Ark as their bargaining representative.

On April 7, 1998, two off-duty Ark employees entered the casino and distributed handbills to customers in front of America, one of the Ark restaurants on the Respondent's premises. That same day, two other off-duty Ark employees entered the casino and distributed handbills to customers in front of another Ark restaurant, Gonzalez y Gonzalez. On April 9, two off-duty Ark employees (one of whom had distributed on April 7 in front of America) went to the porte-cochere (the area just outside the main entrance to the casino), where they distributed handbills to customers as they entered the facility. The handbills bore an area standards message, stating that Ark paid its employees less than unionized workers and urging customers to tell Ark to sign a union contract. None of the handbillers physically restricted customers in entering or leaving the restaurants or the casino.

¹ The Respondent has excepted to the judge's refusal-to-strike portions of the General Counsel's posthearing brief to the judge. It does not, however, explain the basis for its position. We therefore find no merit in the exception.

In each instance, the Respondent's managers informed the handbillers that they were trespassing on the Respondent's property. When the handbillers refused to leave, the Respondent called the police, who issued trespass citations to all but one of the handbillers and escorted them off the premises. The other handbiller was escorted from the premises by the Respondent's security officers. The Respondent has requested the Las Vegas district attorney's office not to prosecute any of the handbillers, and the Respondent has been advised that the district attorney is not pursuing any of the trespass citations.

The judge found that the Respondent violated Section 8(a)(1) of the Act by preventing the off-duty Ark employees from engaging in protected handbilling on the Respondent's premises. In reaching that conclusion, the judge found that, because the Ark employees worked at the casino on a regular and exclusive basis, they were not trespassing when they entered the Respondent's property to handbill.² Accordingly, even though they were employed by Ark and not by the Respondent, the handbillers were rightfully on the Respondent's property pursuant to their employment relationship, and thus were entitled to distribute handbills in nonwork areas of the casino unless the Respondent could show that it was necessary to prohibit their activities in order to maintain production or discipline.³ The judge also found that the areas in front of America and Gonzalez y Gonzalez and in the porte-cochere, where the employees were handbilling, were nonwork areas (or, in the areas in front of the restaurants, mixed use areas), in which employees should be allowed to engage in protected distribution.⁴ Finally, the judge found that the Respondent had not shown that the distribution of the handbills interfered with production or discipline.

The Respondent has excepted to each of the judge's findings. It has also excepted to the judge's failure to find that the handbilling was unprotected because, the Respondent contends, it was part of a course of union conduct that had unlawful objectives. For the reasons discussed below, we find no merit in those exceptions.

In *New York New York Hotel & Casino (New York New York I)*,⁵ the Board found that the Respondent violated Section 8(a)(1) by prohibiting handbilling in the

² As the judge further noted, employees are allowed to spend their off-duty hours using the casino facilities.

³ See *Gayfers Department Store*, 324 NLRB 1246, 1249-1250 (1997), citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

⁴ Concerning the handbilling in the porte-cochere, see *Santa Fe Hotel & Casino*, 331 NLRB 723 (2000), in which the Board found that the area outside the front entrance to a similar facility was not a work area even though, as in this case, several classifications of employees worked in the area on a regular basis.

⁵ 334 NLRB No. 87 (2001).

porte-cochere. Like the judge here, the Board found that off-duty Ark employees were entitled to engage in area standards handbilling in nonwork areas of the Respondent's facility unless by doing so they would interfere with production or discipline; that the porte-cochere was a nonwork area; and that the Respondent had not shown that the handbilling would interfere with production or discipline. The Board also rejected the Respondent's argument that the handbilling was unprotected because it was part of a course of conduct on the part of the Union that violated Section 8(b)(4) and/or 8(b)(3).

The record in this case concerning the handbilling in the porte-cochere, as well as the evidence bearing on the Respondent's contention that the handbilling (both in the porte-cochere and inside the casino) was unprotected, is virtually the same as in *New York New York I*.⁶ The transcripts and exhibits from *New York New York I* were made part of the record in this case, and no additional evidence was introduced in this case concerning either the nature of the work that is normally performed in the porte-cochere or the Respondent's contention that the handbilling was in aid of unlawful activities. We shall not, therefore, revisit those issues here.

For the reasons discussed in *New York New York I*, we agree with the judge in this case that the off-duty Ark employees who took part in the handbilling, both inside the casino and in the porte-cochere, were engaged in protected activity and that they were not trespassing when they did so, but were lawfully on the Respondent's premises pursuant to their employment relationship with Ark. We also agree with the judge, again as explained in *New York New York I*, that the porte-cochere is not a work area and that the Respondent did not demonstrate that handbilling in the porte-cochere would interfere with production or discipline. We therefore adopt the judge's finding that the Respondent violated Section 8(a)(1) by prohibiting the employees from handbilling in the porte-cochere.

Although we have found that the employees who were handbilling in front of America and Gonzalez y Gonzalez were not trespassing and were engaged in protected ac-

tivity, we must decide whether the Respondent could have prohibited their conduct because those areas were work areas or because handbilling in those areas was likely to interfere with production or discipline. The judge found that neither of those conditions existed. He found that the work done in front of the restaurants is principally cleaning and maintenance and that the Respondent's employees do not perform that work constantly, but rather on a rotating schedule, and as needed. While the judge also found that employees do work consistently in nearby areas (such as the front desk, the business center, and the gaming floor) and that both employees and customers (including hotel guests) frequently pass through the areas in front of the restaurants, nevertheless he found no evidence that the handbilling interfered with either the public's access to the restaurants or with employees' performance of their duties.

The judge concluded that the area in front of the restaurants where the handbilling took place was at most a "mixed use" area,⁷ and that the handbilling was not "of such a nature that the Respondent's management interests out-balanced the employees' Section 7 rights."⁸ Accordingly, the judge found that the Respondent acted unlawfully by refusing to allow the off-duty Ark employees to distribute handbills to customers in front of America and Gonzalez y Gonzalez. We agree with the judge that the Respondent's prohibition of handbilling in front of the restaurants was unlawful, but we reach that conclusion for somewhat different reasons.

In *Santa Fe Hotel & Casino*, supra, the Board was confronted with similar issues concerning employees' attempts to engage in protected handbilling outside the entrances to a facility similar to the Respondent's, in areas analogous to the porte-cochere. Like the Respondent, the employer in that case contended that the areas around the entrances were work areas because bellmen, valet parking attendants, gardeners, cleaning and maintenance personnel, and security officers worked in those areas either continuously or on a regular basis. The Board rejected that contention. It held, as the Board had held before, that the occurrence of nonproduction work on part of an employer's property does not in itself allow the employer to declare the whole of its property to be a

⁶ The evidence in this case differs from the earlier case in only two respects, besides the dates of the handbilling. First, unlike the handbills in *New York New York I*, those distributed in this case did not expressly disclaim a dispute with the Respondent. Second, there is no contention, and no evidence, that the nonhandbilling activities asserted to be unlawful in *New York New York I* were still continuing at the time of the events in this case. We find that neither of the latter factors compels a different result from that in *New York New York I*. Indeed, given the absence of evidence that the assertedly unlawful nonhandbilling activities were ongoing at the time of the events in this case, we think that the Respondent's argument that the handbilling here was in aid of such assertedly unlawful conduct is even weaker than in *New York New York I*.

⁷ The judge cited *United Parcel Service*, 327 NLRB 317 (1998).

⁸ In support of this finding, the judge cited *Hughes Properties, Inc. v. NLRB*, 758 F.2d 1320 (9th Cir. 1985), enfg. *Harold's Club*, 267 NLRB 1167 (1983). We interpret this finding as meaning the same thing as the judge's additional finding that the Respondent had not shown that the handbilling interfered with maintaining production or discipline at the casino. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 572-573 (1978), in which the Supreme Court used "management interests" interchangeably with the employer's need to avoid interference with production and discipline.

work area.⁹ The Board found that the main function of the employer's facility was to lodge people and allow them to gamble, and that the work activity that took place at the exterior entrances to the casino was incidental to that function. The Board concluded that to find such areas to be work areas where handbilling could be prohibited would effectively destroy the employees' right to engage in protected distribution.¹⁰

We find that the same considerations apply to the handbilling in the interior of the Respondent's casino. Like the employer in *Santa Fe Hotel & Casino*, the Respondent is primarily in the business of providing people with hotel and gambling facilities. The areas in front of America and Gonzalez y Gonzalez are not gambling or lodging areas. They are passageways through which employees, guests of the facility, and the public pass from one area of the facility to another. As the judge found, cleaning and maintenance personnel work in those areas, but that is the same kind of work that the Board in *Santa Fe Hotel* found to be incidental to the facility's main function of providing gambling and lodging facilities. Numerous employees pass through those areas in the course of their work (for example, bellmen transporting guests' luggage from the entrances to their hotel rooms), but it would be a rare portion of such a facility which no employees used in that fashion. As the Board found in *Santa Fe Hotel*, to hold that such passageways constitute work areas would effectively deny employees the right to engage in protected distribution anywhere on the Respondent's property.

As the judge found, various employees of the Respondent do work consistently in areas near the passageways where the handbilling occurred. Contrary to our dissenting colleague, however, that does not establish that the passageways themselves were work areas. Significantly, the judge found no evidence that the handbilling interfered with the Respondent's employees, and neither the Respondent nor our colleague contends that any such interference occurred. This absence of interference with the Respondent's employees is persuasive evidence that the passageways in front of the restaurants were not work areas.

Accordingly, we find that the passageways in front of America and Gonzalez y Gonzalez are not work areas and that, because the Respondent failed to show that the Ark employees' handbilling was likely to interfere with

production or discipline, it could not lawfully prohibit the handbilling in those areas.¹¹

Contrary to the Respondent, we do not believe that our findings in this regard are inconsistent with Board precedent. In determining whether employees have the right to engage in protected solicitation and distribution in gambling casinos, the Board has employed the analysis initially devised for retail stores.¹² In *Marshall Field & Co.*,¹³ the Board held that a retail store could prohibit employee solicitation not only in selling areas but also in aisles and corridors inside the store, to avoid creating traffic and safety hazards. The Respondent argues that the areas in front of the restaurants were the equivalent of aisles and corridors in retail stores, and therefore that it was lawful to prohibit distribution of handbills in those areas.

We disagree. We do not believe that *Marshall Field* stands for the proposition that a casino owner may prohibit solicitation and distribution in passageways that are not part of the gaming area, regardless of the circumstances. The Board in *Marshall Field* held that solicitation in such areas could be prohibited because "solicitation carried on in such limited space may create traffic and safety hazards tending to disrupt and interfere with Respondent's business to a serious degree."¹⁴ In our view, this rationale, which is based on the relatively narrow aisles near the selling floors of retail stores, cannot reasonably be applied here.

The handbilling in front of America and Gonzalez y Gonzalez was carried out in spacious passageways where it created no impediment to the flow of customer and employee traffic through the area, and certainly posed no threat to anyone's safety. The passageway in front of America, where the first handbilling episode took place, measures approximately 25 feet between the front of the restaurant and the nearest bank of slot machines directly across the aisle. The passageway in front of Gonzalez y Gonzalez, where the other episode occurred, appears to be almost as wide. Videotapes of both instances of handbilling plainly show that the handbillers did not interfere with traffic flow and were not likely to do so. The parties stipulated that no customer was impeded in entering or leaving either restaurant, and there is no evidence that any employee was hampered in the performance of his duties, by the Ark employees' handbilling

⁹ See *U.S. Steel Corp.*, 223 NLRB 1246, 1247-1248 (1976).

¹⁰ 331 NLRB 723, quoting *U.S. Steel Corp.*, 223 NLRB at 1248.

¹¹ In reaching this result, we do not rely on the judge's finding that the areas in front of the restaurants are "mixed use" areas in which distribution must be permitted.

¹² See, e.g., *Dunes Hotel*, 284 NLRB 871, 876-878 (1987); *Harold's Club*, 267 NLRB at 1167.

¹³ 98 NLRB 88, 92 (1952), modified on other grounds 200 F.2d 375 (7th Cir. 1952).

¹⁴ 98 NLRB at 92 (emphasis added).

activities. In circumstances such as these, we do not think that *Marshall Field* is good authority for prohibiting protected distribution of handbills in the areas in front of these two restaurants.

Moreover, the handbilling in front of Gonzalez y Gonzalez took place in a location somewhat removed from the gaming area. Gonzalez y Gonzalez is located in an area known as the "Village Streets," which is made up almost entirely of restaurants and other eating places, not gaming facilities. In effect, the employees were handbilling in a restaurant area, not a gambling area. In these circumstances, the Respondent's argument that the passageway in front of Gonzalez y Gonzalez should be treated like the aisles and corridors in a retail store is especially unpersuasive.¹⁵

For all the foregoing reasons, then, we find, in agreement with the judge, that the Respondent violated Section 8(a)(1) by prohibiting the off-duty Ark employees from engaging in protected handbilling in the porte-cochere and in the areas in front of America and Gonzalez y Gonzalez, and we adopt his recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, New York New York Hotel, LLC d/b/a New York New York Hotel and Casino, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

CHAIRMAN HURTGEN, concurring in part and dissenting in part.¹

The owner of the property herein is Respondent New York New York Hotel and Casino (New York). Ark operates two restaurants within the hotel (Gonzalez y Gonzalez and America). The employees of Ark had an area standards dispute with Ark. While off duty, they handbilled in front of the hotel (porte-cochere area) and in front of the restaurants (inside the hotel). In each in-

stance, New York told them to leave and called the police.

The principal issue is whether these employees had a Section 7 right to handbill *on hotel property*.² In *Southern Services*, 300 NLRB 1154 (1990), enf'd. 954 F.2d 700 (11th Cir. 1992), and *Gayfers Department Store*, 324 NLRB 1246 (1997), the employees of a contractor were engaged in Section 7 activities vis-a-vis the contractor. The contractor was performing services for the owner of the property. The Board held that the employees had a right to engage in Section 7 activity under the principles of *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), even though they were not employed by the property owner. I do not pass on the validity of these cases. However, I agree that where, as here, the primary disputant has a fixed place of business on the property of another, the employees of that primary disputant have Section 7 rights under *Republic Aviation*.³

Under *Republic Aviation*, these employees could distribute in nonwork areas, but not in work areas. I conclude that the porte-cochere area and the area outside the Gonzalez y Gonzalez restaurant were nonwork areas. However, I conclude that the area outside the America restaurant was a work area. This is so because of the proximity of slot machines to the space in question. A row of slot machines was stationed approximately 27 feet directly across from the entrance to America, with additional slot machines immediately to the right of those slot machines. These additional slot machines surround a structure in the middle of the casino floor that houses a service bar and public restrooms. Employees involved in the hotel's gaming operations are among those who work in these areas in front of and adjacent to the entrance of America. These include change persons from the Respondent's Slot Operations department. These employees circulate throughout the area in carts resembling miniature New York taxi cabs, sell change to customers, convert cash into coins for customers to play the machines, and convert large bills into smaller denominations.

Slot floor employees also refill slot machines, pay customers who win jackpots, and perform minor slot machine repairs. They also circulate around the area to ensure the orderly use of the machines and also to ensure

¹⁵ In finding that *Marshall Field* does not support the Respondent's prohibition on handbilling in front of the two restaurants, we do not rely on *Harold's Club v. NLRB*, cited by the judge. The activity in that case took place not in a passageway but in a public lounge adjacent to the casino floor. Relying on *Marshall Field*, the Board in *Harold's Club* held that employee solicitation in the lounge, as in restaurants within retail stores, could not lawfully be forbidden as long as the employees were using the lounge in a manner consistent with the lounge's purpose. 267 NLRB 1167. In *Marshall Field*, however, the Board distinguished between restaurants on the one hand, and aisles and corridors on the other, in retail stores and held that the employer could lawfully prohibit solicitation in the latter but not the former. 98 NLRB at 92-94. Accordingly, we find *Harold's Club* inapposite to this case.

¹ See also my concurrence in *New York Hotel & Casino*, 334 NLRB No. 87 (2001) (*New York New York I*).

² In my concurrence in *New York New York I*, I found that picketing that took place outside the casino may have had an unlawful objective. Even if the picketing had such an objective, however, the handbilling was separate from the picketing and therefore was not tainted by the unlawful character of the picketing.

³ I recognize that these employees were off duty when they handbilled. I further recognize that some of them handbilled *inside* the hotel. However, they were *outside* the Ark restaurants, which were the targets of the handbilling.

that no minors are playing the machines in the area. Slot technicians perform major slot machine repairs. There are also other employees of the casino whose daily job responsibilities require them to work with or near the slot machines. I cannot agree with my colleagues' description of these areas as mere "passageways" for employees and guests when they pass from one area of the casino to another. Unlike the outdoor porte-cochere and the space outside the Gonzalez y Gonzalez restaurant in the same complex,⁴ they are, in a very real sense, employee work stations.⁴

Under *Republic Aviation*, an employer is privileged to prohibit the distribution of union literature in working areas and in nonworking areas. Since I find that the area outside the America restaurant is a working area, I find that the Respondent was justified in prohibiting the handbilling, and I would dismiss the portion of the 8(a)(1) complaint relevant thereto.⁵

Nathan W. Albright, Esq., for the General Counsel.

Gary C. Moss, Esq. and Celeste M. Wasielewski, Esq., for the Respondent.

Kevin Kline, for the Charging Party.

DECISION¹

ALBERT A. METZ, Administrative Law Judge. The issue presented is whether the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act)² by prohibiting off-duty employees of a subcontractor from distributing union handbills on its property. On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the parties' briefs, I make the following findings of fact.³

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Respondent operates a hotel and casino in Las Vegas, Nevada. Part of the services offered at this facility include food

and restaurant operations that the Respondent leases to other companies. One such leasee is Ark Las Vegas Restaurant Corporation (Ark). Ark operates the America, Gonzales y Gonzales (GyG) and Gallagher's restaurants, the Village Streets (a food court), the Employee Dining Room (EDR), and the Respondent's room service. The persons working at these food service facilities are employed by Ark and work regularly at the Respondent's casino. They are permitted to use the Respondent's gaming facilities during their off-duty hours. Ark's operations at the Respondent's casino are nonunion. Since late 1996 the Union has been seeking to organize Ark's employees.

An unfair labor practice hearing involving the same parties and some similar issues was heard by Judge Timothy D. Nelson on February 11, 1998.⁴ The record and decision from that hearing were received as part of the record in this case. The earlier case involved union handbilling by Ark employees outside a main entrance to the Respondent's casino known as the porte-cochere. Part of the present case involves Ark employee handbilling at that same location. The remainder of this case concerns handbilling by Ark employees at entrances to Ark's restaurants located inside of the Respondent's casino.

III. THE HANDBILLING ON APRIL 7 AND 9

The Parties stipulated to the following facts:

1. That on April 7, 1998, Donald Goodman and John Ensign, two off-duty employees of Ark, entered Respondent's property and handbilled customers of Ark's "America" restaurant and other customers of Respondent passing by the entrance to the "America" restaurant. Both Goodman and Ensign distributed [handbills] to customers entering and exiting the "America" restaurant and other customers of Respondent passing by the entrance to the "America" restaurant and were engaged in such handbilling in the area located immediately outside the entrance to the "America" restaurant. Supervisors and agents of Respondent (security officers Don Fisher, Rena Flavin and others) informed Goodman and Ensign that they were not allowed to distribute [handbills] on Respondent's property and that both Goodman and Ensign were trespassing. Dennis Shipley (Respondent's vice president of human resources) asked for, and was provided, a copy of the handbill. (GC Exh. 2, exh. A.) (This handbill protests Ark as being "unfair" for having no contract with the Union.)

2. Respondent, through its admitted supervisors and agents within the meaning of Section 2(11) and 2(13) of the Act, caused Las Vegas Metropolitan Police (Metro) to be called because of the handbilling occurring on Respondent's property and Metro arrived and advised both Goodman and Ensign that they would be cited for trespass if they did not leave Respondent's premises. Both Goodman and Ensign refused to leave and were cited by Metro for trespass. Respondent has requested that the Las Vegas district attorney's office not prosecute Goodman and Ensign and Respondent has been advised that the district attorney's office is not pursuing the trespass citations issued to Goodman and Ensign. Both Goodman and Ensign left the property without incident after receiving the citations for

⁴ *Santa Fe Hotel & Casino*, 331 NLRB 723 (2000), is distinguishable. In that case, the Board specifically found that the handbilled entrances *outside* the Respondent's hotel-casino were not working areas. *Id.*, slip op. at 1.

⁵ In response to my view that the handbilling occurred in a work area, my colleagues say that the handbilling did not in fact interfere with Respondent's employees. However, under *Republic Aviation*, once it is established that an area is a work area, the employer can presumptively ban handbilling there. There is no need to show that handbilling in fact is interfering with the employer's operations.

¹ This case was heard at Las Vegas, Nevada, on December 17, 1998.

² 29 U.S.C. §158 (a)(1).

³ The Respondent's posthearing motion to strike portions (two sentences) of the Government's brief is denied.

⁴ Case 28-CA-14519. Judge Nelson's decision is dated June 29, 1998 (JD (SF)-68-98).

trespass. During the handbilling engaged in by Goodman and Ensign, both did not physically restrict the ingress or egress from the "America" restaurant by any customer of Ark or Respondent.

3. That on April 7, 1998, Donald Estes and Daniel Malero, two off-duty employees of Ark, entered Respondent's property and handbilled customers of Ark's Gonzalez y Gonzalez restaurant (GyG) and other customers of Respondent passing by the entrance to GyG. Estes and Malero distributed [handbills] to GyG customers entering and leaving GyG and other customers of Respondent passing by the entrance to GyG and were engaged in such handbilling in the area immediately outside the entrance to GyG. GyG is located in a food court-type area of Respondent's facility. Both Estes and Malero were approached by security officers of Respondent, who are admitted to be agents of Respondent within the meaning of Section 2(13) of the Act, and were advised by such security officers that they would be cited for trespass by Metro because of the handbilling occurring on Respondent's property and were advised they would be cited for trespass if they did not leave Respondent's property. Estes was issued a trespass citation by Metro and Malero was not. Malero was escorted off Respondent's property by Respondent's security officers and left the property by a different exit than Estes. Respondent has requested that the Las Vegas district attorney's office not prosecute Estes and Respondent has been advised that the district attorney's office is not pursuing the trespass citation issued to Estes.

4. During the handbilling engaged in by Estes and Malero, both did not physically restrict the ingress or egress from the GyG by any customer of Ark or Respondent.

5. That on April 9, 1998, Donald Goodman and Antonio Ramirez, two off-duty employees of Ark, handbilled customers of Respondent who were entering or exiting Respondent's property in the "porte-cochere" or valet parking area. Both off-duty employees distributed [handbills] to customers of Respondent. Respondent's admitted supervisors and agent(s), Ward Barrows, caused Metro to be called because of the handbilling engaged in by Goodman and Ramirez and both Goodman and Ramirez refused to leave the valet parking area and were cited by Metro for trespass. Like the citations referred to above, Respondent has requested that the Las Vegas district attorney's Office not pursue such trespass charges and the charges against Goodman and Ramirez are not being pursued by the Las Vegas district attorney's office.

6. During the handbilling engaged in by Goodman and Ramirez, both individuals did not physically restrict the ingress or egress of any customer of Respondent. (GC Exh. 2.)

In addition to the stipulation, testimony and exhibits were offered to describe activities that occurred at and near the entrances to the restaurants where the handbilling took place. In sum, the public uses walkways that pass these entrances. Respondent's employees likewise use the same passages to access other areas of the casino. Certain of Respondent's employees also clean and maintain the areas in question as part of their regular duties. Nearby areas include gaming, hotel, and similar functions that are offered to the public. These areas are staffed by Respondent's personnel including such jobs as change persons slot floor persons slot technicians, booth cashiers, keno

runners, business center mail and information operations, EVS, maintenance, bellmen, cocktail servers, and bar personnel.

The porte-cochere entrance into the casino consists of six lanes for vehicle traffic with an 18-foot-sidewalk bordering the building. A portion of the sidewalk is cordoned off for guests to wait in line for taxis. The sidewalk is immediately in front of nine sets of double doors that lead into the casino. Doormen, valet attendants, and baggage handlers regularly work at this location. These classifications work at this entrance on a three shift 24-hour basis. Additionally, bellmen, cleaning, maintenance, and security employees of the Respondent occasionally work in and around the porte-cochere.

IV. THE PARTIES' CONTENTIONS

A. Government

The parties agree that the central issue of this case is whether or not Respondent's property rights must yield to the Section 7 rights of the off-duty Ark employees who conducted the handbilling. The Government argues that handbilling by off-duty Ark employees publicizing their labor dispute with Ark is protected and the Respondent's property rights must yield to the employees Section 7 rights because they are not strangers to the Respondent's property. The Ark employees not only work at the casino but are invited there to personally use the casino's facilities when not on duty. The Government further contends the handbilling was done in nonselling and nonwork areas of the facility and was not disruptive to employees and patrons.

B. Respondent

The Respondent argues that the off-duty Ark employees are not Respondent's employees and that it lawfully banned these nonemployees from handbilling on the interior and exterior of its private property. In the alternative the Respondent asserts that if the Ark employees are considered employees at the casino location they nonetheless were properly prohibited from distributing union handbills because the areas in question are working areas or aiseways and the handbilling ban is necessary for legitimate business reasons.

V. ANALYSIS

A. Employee Status of the Handbillers

There are two legal analyses for determining whether solicitation on an employer's property is protected by Section 7 of the Act. The Supreme Court has made a distinction between the rules of law applicable to employees and those applicable to nonemployees. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), governs solicitation and distribution by employees properly on company property pursuant to the employment relationship. In *Republic*, the Court found an employer could not prohibit its employees from distributing union literature in nonworking areas of its property during nonworking time unless the employer could show that the restriction was necessary to maintain production or discipline. *Supra* at 803. *Babcock & Wilcox*, 351 U.S. 105 (1956), by contrast, related to a situation in which nonemployee union organizers attempted to enter an employer's property to distribute union organizational literature. The Court held that there is a distinction "of substance" between "rules of law applicable to employees and

those applicable to nonemployees.” *Babcock & Wilcox*, 351 U.S. at 113. See also *Jean Country*, 291 NLRB 11 (1988). The Court emphasized the distinction in *Hudgens v. NLRB*, 424 U.S. 507, 521 fn. 10 (1976): “[a] wholly different balance was struck [in *Republic Aviation*] when the organizational activity was carried on by employees already rightfully on the employer’s property, since the employer’s management interests rather than his property interests were there involved.” See also *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

Applying the distinction set forth by the Supreme Court, I find that the instant case falls under the *Republic Aviation* standard rather than the *Babcock & Wilcox* standard. Ark is subcontractor retained by the Respondent to provide restaurant and food services in the casino. The handbilling employees work at the casino premises on a regular and exclusive basis. Not only do they routinely work at the casino but they are also invited to spend off-duty hours using the facilities. Thus the Ark employees were not trespassing when they entered the property to handbill. Under all of these circumstances, it is reasonable to require the Respondent to treat the Ark employees engaged in organizing activities under the *Republic Aviation* standard. I find that the handbilling Ark workers should be considered to be “employees” under the Act for purposes of assessing their rights to distribute union materials at their work site. *Gayfers Department Store*, 324 NLRB 1246 (1997) (Act violated when subcontractor’s employees threatened with arrest and removed from the Respondent’s property because they engaged in the distribution of area-standards handbills directed at customers of the Respondent.); *Harvey’s Resort Hotel*, 271 NLRB 306 (1984) (Unlawful to maintain no solicitation/no distribution rule pertaining to off-duty employees soliciting on the employer’s property, while they were allowed to remain on its premises for other reasons).⁵

B. Handbilling at Restaurant Entrances

Work in the immediate area of the restaurant entrances mainly involves cleaning what amounts to sidewalks leading to other areas of the casino. Respondent’s employees do not constantly work in front of the restaurants, rather the immediate area is maintained as needed. Nearby areas have gaming and clientele service areas such as slot machines, a business center and check in stations. Employees do consistently work in these nearby areas. The public and employees regularly walk past the restaurant entrances either for ingress into the restaurant or on their way to other areas of the casino. There is no evidence that any of the handbilling at these interior locations caused any interference with either the public or employees. I find that, at most, the handbilling in front of the restaurants occurred in a mixed-use area. As such I do not find that the handbilling by the restaurants was of such a nature that the Respondent’s management interests out-balanced the employees’ Section 7 rights.

⁵ The Government also argues that Ark and the Respondent constitute a single integrated enterprise and that the Ark employees should, therefore, be considered Respondent’s employees. In light of my finding that the Ark employees enjoy the status of “employees” on the Respondent’s premises because of their regular and exclusive employment there, I find it unnecessary to decide the additional issue of their being employed by a single integrated enterprise.

Hughes Properties, Inc., 758 F.2d 1320 (9th Cir. 1984), enf. 267 NLRB 1167 (1983) (Respondent’s no solicitation rule held overly broad when applied to prohibit casino employees from soliciting fellow employees during off-duty hours in public bar adjacent to casino gambling area); *United Parcel Service*, 327 NLRB 317 (1998) (Respondent violated Sec. 8(a)(1) by interfering with employee’s distribution of union literature in, or near, a mixed use check-in area).

C. Handbilling at the Porte-Cochere

The porte-cochere is a busy main entrance to the Respondent’s casino and hotel. Employees are stationed there to assist clientele who are arriving and leaving the premises. Maintenance functions are also performed at this site as required. Again there is no evidence that the handbilling by the Ark employees interfered with the employees performing their various duties or the public using the entrance.

Judge Nelson’s decision concerning handbilling at the porte-cochere found that the employees were protected by the Act in this activity. In reaching that decision he noted the following:⁶

It appears that the Board has not yet addressed the precise question whether the area outside the front entrance to a casino; such as the porte-cochere area herein, should be regarded as a “nonselling area open to the guest or the public” within the meaning of the *Dunes Hotel* (284 NLRB 871) holding, and thus a protected zone for employee solicitations and distributions. However, on the face of things, such an area would clearly seem to fall within the quoted category, despite the fact that the area may also be a work situs for some of the Respondent’s employees. Thus, the fact that some employees perform work in the porte-cochere area would appear to be legally subordinate to the controlling fact that the area is nevertheless a “nonselling area open to the guests or the public.” In addition I note that the handbilling on July 9 had no adverse impact on either the customers’ entry or egress or on the ability of the Respondent’s employees to perform their customary work there. Finally, contrary to the Respondent’s arguments, I find that handbilling of customers in the porte-cochere area has no inherent tendency to interfere significantly with either the customer’s ingress or egress or with . . . employees who may work in the area. [Footnotes omitted.]

I agree with Judge Nelson’s reasoning that the porte-cochere is a public area. I also find that the Respondent has not shown that the Ark employees’ distribution of union handbills to the public interfered with maintaining production or discipline at the Respondent’s casino.

In sum, I find that the Respondent’s prohibition of the Ark employees’ handbilling at both the porte-cochere and in front of Ark restaurants was an unlawful encroachment upon the employees’ Section 7 rights. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act by refusing to allow Ark employees to distribute union literature in nonworking or mixed areas of the Respondent’s property during nonworking time at their only place of employment.

⁶ JD (SF)—68–98, slip op at 9–10.

CONCLUSIONS OF LAW

1. New York New York Hotel, LLC d/b/a New York New York Hotel and Casino, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Culinary Workers Union, Local 226, affiliated with Hotel Employees and Restaurant Employees International Union, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁷

ORDER

The Respondent, New York New York Hotel, LLC d/b/a New York New York Hotel and Casino, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting subcontractor employees from engaging in protected handbilling in front of Ark restaurants inside of the Respondent's casino or at the porte-cochere entrance to the facility.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 7, 1998. *Excel Corp.*, 325 NLRB 17 (1997).

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT prohibit subcontractor employees from engaging in protected handbilling in front of Ark restaurants in our casino or at the porte-cochere entrance to our facility.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed by Section 7 of the Act.

NEW YORK NEW YORK HOTEL, LLC, D/B/A
NEW YORK NEW YORK HOTEL AND CASINO